

I would allow the appeal with costs here and A  
in the courts below.

*Appeal allowed.*

Solicitors: *Cheang, Lee & Ong; Dharmamanda & Co.*

### TONG SWEE KING v. PEGANG MINING CO. LTD. & ORS.

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) & Ong Hock Thye F.J.) July 17, 1967]

[Ipoh — Federal Court Civil Appeal No. X. 4 of 1966]

*Practice and Procedure — Intervention by interested party not a party in the suit — When leave granted — Principle — Legal right directly affected by these proceedings — R.S.C., 1957, O. 16.*

In 1931 an agreement which contemplated a comprehensive mining scheme was made between Pegang Prospecting Co. Ltd. the lessees of certain mining lands, Ho Man the sub-lessee and Ho Kok Yew the sub-sub-lessee. This agreement is still valid and operative between the successors or representatives of the original parties, who are the 1st respondent company, the 2nd respondents and the appellant respectively in this appeal.

By an agreement made in 1963 and renewed in 1964 the appellant gave to one Choong Sam the right to work the mining lands she derived through the 1931 agreement. At this time the 1st respondent company had been granted certain interjacent mining lands, formerly a railway reserve which could not, for that reason, have been comprised in the original specific mining leases which were still being exploited and worked pursuant to the 1931 agreement. The question arose whether these new mining lands that the 1st respondent company acquired should be thrown into the pool of the comprehensive mining scheme with the result that Choong Sam would have the right to work and exploit these new lands with those he already had from the appellant. The 1st respondent company took the view that the new mining leases were not within the ambit of the 1931 agreement, so that Choong Sam could have the benefit of being able to work them also. Choong Sam therefore having undertaken to indemnify her against all costs and expenses, requested the appellant to bring the present action in the High Court at Ipoh against the respondent company to enforce her claim to work the new lands as being a right accruing to her upon a proper interpretation of the original agreement. The 2nd respondents being necessary parties were made co-defendants in the suit.

In December 1966 the trial judge gave judgment in favour of the 1st respondent. The appellant filed notice of appeal to the Federal Court against the whole of the decision given against her. By an agreement made in secret between the 1st respondent and the appellant on March 1, 1967 she accepted \$10,000 from the company as payment for not proceeding with her appeal. Choong Sam applied to the court for leave to intervene, praying either that his name or that the 2nd respondents' name be substituted, for that of the appellant on record.

Held (Azmi C.J. (Malaya) dissenting): (1) without going into the merits of the appeal itself, the final decision thereof must affect the applicant in a legal right which he has and not merely a commercial interest indirectly affecting his pocket. He, therefore, has a legal interest in the appeal, and in fairness and justice, the applicant ought to be given leave to intervene;

(2) leave given to substitute the applicant's name for that of the appellant, and to add the 2nd respondents as second appellants and in their place substitute the appellant to be jointly respondents with the company.

*Cases referred to:—*

(1) *Amon v. Raphael Tuck & Sons Ltd.* [1956] 1 Q.B. 357.

B (2) *Re Securities Insurance Co.* [1864] 2 Ch. 410.

(3) *In re Ellis* (1875-76), 2 Ch. D. 1.

(4) *Re Markham, Markham v. Markham* (1880-81), 16 Ch. D. 1.

(5) *Joss v. Wood* 55 E.R. p. 411.

(6) *Dollfus Mieg et Compagnie S.A. v. Bank of England* [1951] 1 Ch. 33.

C (7) *In re I.G. Farbenindustrie A.G.* [1943] 2 All E.R. 525; [1944] Ch. 41.

(8) *Oliver v. Ashman* [1961] 3 W.L.R. 669, 682.

(9) *Lyle Meller v. Lewis* [1956] 1 W.L.R. 29, 35-36.

(10) *Central London Property Trust v. High Trees House Ltd.* [1947] K.B. 130; 62 T.L.R. 559.

D (11) *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.* 69 R.P.C. 108; [1955] 1 W.L.R. 761; [1955] 2 All E.R. 657.

(12) *Robertson v. Minister of Pensions* [1949] 1 K.B. 227; 64 T.L.R. 526.

(13) *Harnham Singh v. Jamal Pirbhai* [1951] A.C. 688.

### E FEDERAL COURT.

*Ng Ek Teong* (Miss Tsai with him) for the Intervener.

*Ronald Khoo* for the 2nd respondents.

F *F. C. Arulanandom* (N.T. Rajah with him) for the 1st respondent.

*P. P. Dharmananda* for the appellant.

*Cur. Adv. Vult.*

G Barakbah L.P.: I have had the advantage of reading the judgments of Azmi C.J. (Malaya) and Ong Hock Thye F.J., and with respect I agree with the views expressed by my brother Ong. I have nothing to add except to say that the applicant is legally interested in Civil Suit No. 304 of 1964 as the result of the appeal in the appellant's favour will undoubtedly give the applicant the right to work certain lands along with mining leases Nos. 8899 and 11543 pursuant to the agreement dated 27th July, 1954, made with the appellant. In other words the final decision of the appeal must affect the applicant in his legal right to mine certain lands which are presumably the subject matter of the appellant's claim in the said suit — see the case of *Amon v. Raphael Tuck & Sons Ltd.*<sup>(1)</sup> In my view the applicant is not only commercially interested in the matter but he is legally interested in it.

Furthermore, from the very beginning of the suit the applicant had given the appellant a full and an abundantly secured indemnity against her costs in and by the action and only

at the last moment did she decide not to proceed with the appeal. In the circumstances it seems to me that it is only just and equitable that the applicant should be allowed to intervene. I therefore agree with my learned brother Ong that the application should be granted and the costs of the application should be costs in the appeal.

**Azmi C.J. (Malaya):** This is an application by Choong Sam, to whom I will refer as the intervener, for an order that the name of Tong Swee King, hereinafter referred to as the appellant, be substituted with that of the intervener, or with that of Lee Chin Yee and Chan Hong Peng, hereinafter referred to as the second respondents and in either case the appellant be added as a respondent.

The appellant as the executrix of the estate of Ho Kok Yew deceased brought an action against Pegang Mining Co. Ltd., formerly known as Pegang Prospecting Co. Ltd., and hereafter referred to as the first respondent, and also against the second respondents as executors of Chan Phooi Hong deceased.

It would appear that the first respondent has been sub-leasing certain mining lands held under mining licences Nos. 8899 and 11543 in Lot Nos. 21952 and 29650 in the State of Perak, containing an area of about 77 acres to the second respondents, and the second respondents had been sub-leasing the same to Khong Heng Kongsi now represented by the appellant.

In reference to this land appellant made a contract, the last one apparently on the 1st July 1964, under which the intervener was to work on the mining land and win tin ore from the said land. It was part of the agreement that all the ore won from the said land was to be delivered to the appellant and the proceeds of each sale of ore were to be divided as follows: namely 85½% to the intervener and 14½% to the appellant. The intervener was of course, to employ his own workers for the efficient working of the mine and he also undertook to indemnify the appellant against any loss or damage which she might suffer by reason of any breach of the provisions of the Mining Regulations or orders issued by the Mines Department.

According to the intervener's affidavit affirmed on the 23rd March 1967, the first respondent had refused to grant the necessary sub-lease to the second respondents who, however are ready to sub-lease it to the appellant and as a result the intervener had succeeded in making the appellant bring this action against the first respondent and the second respondents after giving her a full indemnity against her costs — see Exhibit "C" to the intervener's affidavit.

The appellant brought the action Civil Suit No. 304 of 1964 in the High Court at Ipoh

A against the respondents and on the 9th December 1966 the High Court gave judgment in favour of the first respondent. On 6th January 1967, the appellant appealed against the whole of the decision to the Federal Court. But on the 15th March 1967, the appellant and the first respondent executed an agreement under which the first respondent paid her \$10,000 on her undertaking to withdraw the appeal against the said judgment of the High Court.

As a result, the appellant did not proceed with her appeal.

C It is obvious that so far as the intervener is concerned, he has a contractual right against the appellant under his contract dated 1st July 1964. It was urged, however, on his behalf that he is entitled to be added as a party, and in place of the appellant.

D Mr. Ng Ek Teong, on behalf of the intervener firstly cited to us the case of *In Re Securities Insurance Company* (2) and particularly read the following passage to us from the judgment of Lindley L.J. at page 413:—

E "I understand the practice to be perfectly well settled that a person who is a party can appeal (of course within the proper time) without any leave, and that a person who without being a party is either bound by the order or is aggrieved by it, or is prejudicially affected by it, cannot appeal without leave. It does not require much to obtain leave. If a person alleging himself to be aggrieved by an order can make out even a *prima facie* case why he should have leave he will get it; but without leave he is not entitled to appeal."

F It might be mentioned, however, that in the case referred to, the judge having made the order sanctioning an arrangement under the Joint Stock Companies Arrangement Act, 1870, an appeal was presented by persons whose interests as creditors were affected by the scheme, but who had not opposed the scheme at the meeting of creditors, nor appeared before the judge when his sanction was applied for, nor obtained leave to appeal.

G The next case was *ex parte Ellis; In re Ellis*. (3) There it was held that the holder of a bill of sale was entitled to appeal from the adjudication of bankruptcy of a debtor.

H In *re Markham, Markham v. Markham* (4) the headnote says that leave to a person interested in, but not a party to an action, to appeal from an order, may be obtained by *ex parte* application to the Court of Appeal.

I In *Joss v. Wood* (5) leave was given to the Crown to intervene on the ground that it had a claim as duty on the legacy. In other words, that it was materially interested in the matter.

In *Amon v. Raphael Tuck & Sons Ltd.* (1) the headnote says that:—

"The application was, in effect, an application for leave to intervene against the will of the plaintiff; that in such a case the appropriate test to determine whether

the intervener was a party 'who ought to have been joined, or whose presence before the court may be necessary' to enable the court completely and effectually to adjudicate upon and settle all the questions involved in the cause or matter within Order 16, r.11, was: Would the order for which the plaintiff was asking directly affect the intervener, not in his commercial interests, but in the enjoyment of his legal rights? Applying the test, D. was within the rule, for the injunction sought by the plaintiff in effect would restrain the further manufacture of the 'Sixtit' pen and therefore, although the fact that D. was entitled to a royalty or commission gave him only a commercial interest in the continued manufacture, if he could show that the defendants were by contract obliged to manufacture a reasonable quantity of 'Sixtit' pens he would have a right of action against them if they did not do so, and might ask in a subsequent action for specific performance of an agreement which the court had ordered not to be performed. The court accordingly had jurisdiction to make the order sought which, in the circumstances was one which it was proper that the court in its discretion should make."

In *Dollfus Mieg et Compagnie S.A. v. Bank of England*.<sup>(6)</sup> the plaintiffs issued a writ against the Bank of England claiming delivery of certain bars of gold originally held by a French company on behalf of the plaintiffs but looted by the Germans from the French Bank and subsequently recovered in Germany and lodged with the Bank of England by the governments of the United Kingdom, the United States and France for safe custody pending their ultimate disposal. They also applied for an injunction restraining the bank from parting with possession of the gold bars. The bank applied to have the writ set aside on the ground that the bars were in the possession or control of the depositor governments and that the action impleaded two foreign sovereign States which declined to submit to jurisdiction. On this motion Jenkins J. made an order as prayed. On appeal to the Court of Appeal further evidence was given that since the issue of the writ in the action, 13 of the bars had been sold by the mistake of a subordinate official although the bars had been segregated pending receipt of directions from the governments. On that evidence the Court of Appeal reversed the order of Jenkins J. It was desired to appeal to the House of Lords and the governments of the United States and France now applied that they be added as defendants, in order to make independent presentation of the case before the House. It was contended for the applicants and admitted by the bank that the bank would be embarrassed in conducting an appeal in which it would have to protect its own interest and those of the applicants as it might be that the mistaken disposal of the 13 bars would result in the bank's being under a liability both to the plaintiff and the applicants. It was held that there was jurisdiction to make the order prayed as the applicants had a direct interest in the subject matter of the action and a right akin to a proprietary right therein and as the true test was what would be the result on the subject matter if the applicants' right

A could be established.

It should be noted, however, that in this case the Court of Appeal held that the governments, the applicants, had a right nearly akin to a proprietary right and that was the reason why they were allowed to be added as a party in the appeal.

B

Mr. Ng Ek Teong at the end of his address said that the intervener had a legal right on the subject matter of the action and that that right is affected by these proceedings, and therefore he has a right to be substituted as the appellant in the appeal.

C

Mr. Arulanandom for the first respondent said that at the most the intervener had only a commercial interest in the sub-lease and if that is so he has no right to be joined as a party and in support cited to us *re I.G. Farbenindustrie A.G. Agreement*.<sup>(7)</sup> The headnote reads as follows:—

D

"The appellants took out an originating summons, *ex parte*, asking for a vesting order under the Trustee Act, 1925, s.51, of certain patents registered in the name of a German company. They also asked for rectification of the Register of Patents. The basis of application was that the German company were bare trustees for the appellants and that they were entitled to have the patents vested in them and the register rectified accordingly. The respondents to this appeal contended that they should be added as parties to the summons on the ground that they were holders of a compulsory licence granted under the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939:—

E

Held: as the respondents had only a commercial interest in the subject-matter of the summons, they were not entitled to be added as parties and the court had no jurisdiction to add them."

F

At page 528, Lord Greene M.R. said:—

G

"The fact that a person has a commercial interest in litigation and nothing more, in my opinion, not merely gives him no right to demand to be added to proceedings by the result of which that commercial interest may be affected, but the court has no jurisdiction to add him any more than it has jurisdiction to add any man in the street. It is the practice of the court, and the court has power in proper cases, to add at his own request a party who claims to have a legal interest in the subject-matter of the suit. That is a thing that frequently happens in proceedings in the Chancery Division where creditors, debenture holders, beneficiaries and persons of that character, who has as interest in the proceedings, not merely a commercial interest, but a legal interest, can in proper circumstances apply for and obtain an order to be added as defendants in administration proceedings or whatever the proceedings may be. Where a person alleges nothing more than a commercial interest or alleges a legal interest which is shown on the face of it to be non-existent — I say that because counsel did allege a legal interest and he alleged one which, in my opinion, on the facts and in law is completely non-existent — and therefore, comes before the court as a person claiming only a commercial interest in the suit, I have never heard of a case where the court has claimed to exercise jurisdiction to add him as a party."

H

I

In my view, the intervener in this case has no legal interest in the matter. He merely has

a commercial interest and a decision of the court one way or the other would only affect his pocket. If such a person were entitled to be added as a party it would make litigation well nigh impracticable.

In the circumstances, I would therefore say that this court has no jurisdiction to add the intervener as a party, or that his name be substituted for that of the appellant. The application is therefore dismissed with costs.

**Ong Hock Thye F.J.:** On October 22, 1931 an agreement relating to what was described as the "Khong Heng Comprehensive Mining Scheme: Kacha and Menelai" was made between Pegang Prospecting Company, Limited, Ho Man and Ho Kok Yew, respectively the lessee, sub-lessee and sub-sub-lessee of certain mining lands in the Kinta Valley mukim of Blanja. The successors or representatives of the three parties are now the first respondent company, the second respondents and the appellant respectively. The agreement and sub-leases, or renewals thereof, were still valid and operative at all relevant times as far as the present litigation is concerned.

The question at issue was the proper interpretation of clause 4 of the said agreement, which reads as follows:—

"The sub-lessee and the miner and each of them hereby undertake and agree that they will not interfere with or attempt to obstruct or interfere with the acquisition by the company (or its nominees) in the vicinity of the said Khong Heng Kongs Mine of any mining lands or any right, title or interest therein (including water rights, rights of depositing tailings or other rights incidental to mining) which the company may desire to acquire for the purpose of including same in the said mining scheme and the sub-lessee and the miner hereby undertake and agree further that they and each of them will use their best endeavours to assist the company in acquiring such mining lands or interest therein."

The miner referred to was Ho Kok Yew, who carried on mining operations under the name of Khong Heng Kongs; his legal personal representative is Tong Swee King, the appellant. As I understand it, the question arose in this manner. The Kacha and Menelai Mining Scheme comprised *inter alia* Mining Leases Nos. 8899 and 11543, which were separated by the permanent way and reserved lands along a railway line. These interjacent lands having become available for mining after the closure of the railway line, Mining Leases Nos. 14507, 14508 and 14509 over the same were granted to the first respondent company.

By an agreement in writing dated July 1, 1963, made between the applicant, Choong Sam, and the appellant, the applicant was given the right for twelve months to enter upon and work the lands comprised in Mining Leases Nos. 8899 and 11543 in consideration of the payment of tribute. The agreement was renewed on July 1, 1964 for another period of twelve months. On July 27, 1964 what had also been tacitly

A agreed between them for over a year past was reduced to writing in the form of a letter from the applicant to the appellant as follows:—

"(1) If at the expiry of the said agreement by effluxion of time I shall not have committed a breach of any of the terms and conditions therein, you agree to give me yearly renewals of the said agreements up to the term of the said sub-sub-lease which you hold over the said lands. Provided always that in the event that if you shall have had in the first place obtained such extension or renewal to the said sub-sub-lease which you hold over the said lands you shall agree to give me further yearly renewals of the said agreement up to such extended period or periods of your said sub-sub-lease.

C (2) You will use your best endeavours to obtain from the Estate of Chan Phooi Hong deceased and from Pegang Prospecting Co. Ltd., mining rights over the areas to be worked by you as contemplated in the agreement dated the 22nd October, 1931 made between Pegang Prospecting Co. Ltd., Ho Man and Ho Kok Yew, and when the same are obtained, to have them included in the said agreement to be worked by me on the same terms and conditions therein."

D These terms were confirmed by the appellant's signature appended to the letter. Paragraph 2 referred to the new mining leases.

As the lands under Mining Leases Nos. 8899 and 11543 had been worked out on the surface, the interjacent lands comprised in Mining Leases E Nos. 14507, 14508 and 14509 were sought to be brought within the Khong Heng Comprehensive Mining Scheme, of which Mining Leases Nos. 8899 and 11543 were original component parts. Thus the question arose whether, on the proper construction of clause 4 of the 1931 agreement, the respondent company was obliged to throw F their new mining leases into the pool of the said comprehensive mining scheme. In that event they would, of course, be obliged to grant sub-leases resulting in Choong Sam, the applicant, being able to work these lands along with Mining Leases Nos. 8899 and 11543, over which he already holds mining rights under agreement G with the appellant. The respondent company took the view that it was not bound to do so.

H The applicant, therefore, requested the appellant to take action against the respondent company for enforcement of her claim to work the new lands withheld by the company from inclusion in the said mining scheme. The second respondents, being necessary parties, were joined as co-defendants. Before commencing proceedings the following agreement had been made between the applicant and the appellant:—

"IPOH: 12th July, 1963.

I Madam Tong Swee King,  
Managing Partner of  
Khong Heng Kongs,  
No. 2, Lau Ek Ching Street,  
I P O H.

Dear Madam,

Khong Heng Kongs, Papan.

This is to confirm my undertaking to you as follows:—

1. That I shall be solely responsible for all your legal fees, expenses and charges in connection with any arbitration or litigation that may be necessitated on account of Khong Heng Kongsí enforcing its rights against Pegang Prospecting Company Limited under the agreement dated the 22nd day of October 1931 made between Pegang Prospecting Co. Ltd., Ho Man and Ho Kok Yew.
2. This confirmation extends to any legal fees, charges or expenses of the representatives of the Estate of Chan Phooi Hoong deceased (as successors to Ho Man deceased) in respect of any such arbitration or litigation arising out of enforcement of Khong Heng Kongsí's rights under the said agreement.
3. You agree that the final decision whether or not to appeal against any order of court arising out of such arbitration or litigation rests with me.

Yours faithfully,  
(Sd.) CHOONG SAM.

I confirm:

(Sd.) Tong Swee King  
Tong Swee King as Managing  
Partner, Khong Heng Kongsí,  
Papan."

On December 9, 1966 Ali J. gave judgment against the appellant. On January 6, 1967 she filed notice of appeal to the Federal Court against the whole of the said decision. On March 15, 1967 the appellant, having accepted from the respondent company payment of \$10,000 "as an *ex-gratia* payment in full settlement of all her claims against the company without any admission of liability on the part of the company", agreed in consideration thereof to withdraw her appeal and not to prosecute the matter further against the company in any proceedings. In return the company waived all rights to costs awarded in its favour by the court.

Although this agreement was reduced to writing on March 15, 1967 it had in fact been concluded between the appellant and the respondent company at least a week earlier. This is clear from the appellant's letter of March 9, 1967 to Mr. Chin Swee Onn, the advocate and solicitor appointed by the applicant to act on the appellant's behalf in the action and appeal, instructing him to withdraw the appeal. A copy of the letter was simultaneously sent to the Registrar of the Federal Court. On that same date the appellant informed the applicant of her decision.

The negotiations which led to this agreement had, of course, been conducted in secret; otherwise Mr. Chin Swee Onn, the appellant's own solicitor, would not need to be informed on March 9. The respondent company's own solicitors too, had been kept in the dark by their clients. This again seems an irresistible inference. Messrs. Maxwell, Kenion, Cowdy & Jones had been the company's solicitors. Yet they were not the solicitors who prepared and attested the agreement of March 15. This was done by Mr. Arulanandom, who appeared instead

A of a member of the firm of Maxwell, Kenion, Cowdy & Jones to oppose the applicant in this court.

In the circumstances it is perhaps not surprising that the applicant alleged collusion between the appellant and the respondent company designed to release them from their respective obligations. Both vehemently denied the allegation. In an affidavit sworn on April 26, 1967 and filed on behalf of Lee Wan Seng, chairman of the board of directors of the company, by Mr. Arulanandom, the denial was in these terms:—

C "If by the use of the words 'collusive conduct' the said Choong Sam means agreeing together then I do agree that the appellant and the respondent firstly abovenamed have reached an amicable arrangement. If, however, by the use of the words 'collusive conduct' the said Choong Sam suggests a deceitful agreement or compact between the appellant and the respondent firstly abovenamed then I must state, with all emphasis, that there was no collusion of that sort between the appellant and the respondent firstly abovenamed."

D This was repeated *verbatim et litteratim* in the affidavit sworn on April 28 by the appellant and filed on her behalf by her new solicitors, Messrs. Dharmananda & Co. These denials, however, hardly serve to transform the picture. Irrespective of their personal views the fact remains that whether acting in concert pursuant to their agreement was or was not collusive conduct must depend on the object intended and achieved. That they succeeded goes without saying, for the proper construction of clause 4 no longer falls to be determined by the courts unless the applicant obtains the leave he prays for to intervene. He accordingly moves this court for an order that either the name of the appellant on the record be substituted by that of the applicant himself or by those of the second respondents, who support the application, and that in either case the appellant be added as a respondent to the appeal.

G On the merits of this application I have had the advantage of reading the draft judgment of the learned Chief Justice. After quoting the headnote in the All England Reports of *In re I.G. Farbenindustrie A.G.*,<sup>(7)</sup> and an excerpt from the judgment of Lord Greene M.R., he quotes the editorial note as follows:—

H "To be joined as a party a person must, however, have a legal interest in the subject-matter of the proceedings. That interest has been called a legal interest, not by way of contrast with an equitable interest but as being an interest which the law recognises. It is not sufficient that the person has a commercial interest and is likely to be affected in his pocket by a decision one way or the other. If such a person were entitled to be added as a party, it would make litigation well-nigh impracticable."

I Then he goes on:—

"That expresses my view. I would therefore say in this case that the intervener has no legal interest in the matter. All he has is a commercial interest, an

interest that would affect his pocket; and I would therefore say that this court has no jurisdiction to add him as a party."

While agreeing with the learned Chief Justice that the editorial note accurately summarises the law, I must say, with the utmost respect, that I am absolutely nonplussed by his ratiocination therefrom. To draw, from the facts in *I.G. Farbenindustrie*, the conclusion "that the intervener has no legal interest in the matter," necessarily means that, in the judgment of the learned Chief Justice, the present applicant stands in no better position than Boots Pure Drug Co. when they opposed the application of Bayer Products Ltd. for a vesting order relating to certain patents standing in the name of the German company. I should have thought that the *dicta* expressed in *I.G. Farbenindustrie* are clearly in the applicant's favour rather than otherwise. The facts in that case and in the present one are, in my view, as different as night is from day. To quote Lord Greene M.R. ([1944] Ch. at p. 42) :—

"It is argued by Mr. Valentine Holmes that in view of the language of the Patents, &c. (Emergency) Act, 1939, Boots have a legal interest in the subject-matter of the summons to which they seek to be added as a party. He confessed himself, however, unable to find any words which could appropriately describe the nature of that legal interest and I share his difficulty. He pointed out that under the licence and the Patents, &c. (Emergency) Act, 1939, his clients are entitled to bring proceedings in their own name, but that is also possible under sections 24 and 27 of the Patents Acts, for the grantee of a compulsory licence granted under those sections can in certain circumstances bring an action for infringement in his own name. It seems, however, clear that such a right in a licensee has nothing to do with the subject-matter of these proceedings which relate solely to the legal title to these patents. Ought that title to be vested in Bayers, or ought it to remain vested in I.G.? Whichever way that question is answered, the position of Boots cannot be affected from the legal point of view. When I say 'legal interest' I am not thinking of any distinction between a legal and an equitable interest, but of an interest which the law recognizes."

In that case it should be observed that counsel for Boots was himself unable to describe the nature of the legal interest which had to be shown to support the application. In the instant case, however, the learned Chief Justice, while stating his conclusion, gave no reasons that I am able to discover for holding that all the applicant had was a commercial interest. With all respect this reminds me of what Holroyd Pearce L.J. said in *Oliver v. Ashman*:—<sup>(8)</sup>

"To say in Shelley's words 'I cannot argue, I can only feel' may be permitted in a juryman but it is rarely a sound foundation for a judgment."

In the instant case, far from being unable to disclose a legal interest, the applicant has shown that, in the event that clause 4 obliges the respondent company to sub-lease the inter-jacent new mining lands, the appellant would in turn be bound by her contract with the appli-

A cant to renew annually his right to work these lands till exhaustion of the ore contents. The rights of the appellant against the respondent company to work the lands, even if the second respondents were bought out, would *prima facie* be specifically enforceable. So would the applicant's rights against the appellant. Once it is held that the appellant has such rights the applicant's own rights cannot be denied. If this substantive right can be passed over in cavalier fashion by describing it as a "commercial interest", then I confess I do not know where to draw the line between a legal right and a commercial interest. At the risk of tedious repetition I quote again Lord Greene M.R. regarding the position of Boots:—

"Ought the title to be vested in Bayers, or ought it to remain vested in I.G.? Whichever way that question is answered, the position of Boots cannot be affected from the legal point of view."

For my own part, therefore, I have no doubt that the applicant has a very real legal interest in the subject-matter of the litigation.

Such being the case, the applicant is clearly an aggrieved person whose legal rights have in effect been defeated or circumvented by the appellant and the respondent company acting in concert to cut the ground from under his feet. Are the courts powerless in these circumstances to prevent an injustice? The authorities are clear: see *Amon v. Raphael Tuck & Sons Ltd.*; <sup>(1)</sup> also *Dollfus Mieg et Cie S.A. v. Bank of England* <sup>(6)</sup> and *In re I.G. Farbenindustrie A.G.* <sup>(7)</sup>

In *Raphael Tuck's* case Devlin J. (as he then was) speaking of Order 16, rule 11, at page 368, said:—

"... the present case, in my view, turns upon the true construction of the rule, and in particular the meaning of the words, 'whose presence before the court may be necessary in order to enable the court effectively and completely to adjudicate upon and settle all the questions involved in the cause or matter'. The beginning and end of the matter is that the court has jurisdiction to join a person whose presence is necessary for the prescribed purpose and has no jurisdiction under the rule to join a person whose presence is not necessary for that purpose."

His Lordship went on thus, at page 371:—

"If this is the line of authority that is the correct one to apply, then I think the test is: 'May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal right?'"

At page 379 he said:—

"It had always been the practice in equity to join as parties not merely those who in strictness 'ought to have been joined' but also those whose presence was necessary to complete and effectuate justice."

Finally, at page 381, is the following passage:—

"It is not enough that the intervener should be commercially or indirectly interested in the answer to the question; he must be directly or legally interested in the answer. A person is legally interested in the answer only if he can say that it may lead to a result

that will affect him legally — that is by curtailing his legal rights. That will not be the case unless an order may be made in the action which will operate on something in which he is legally interested."

The appellant and respondent company have both strenuously opposed this application. I shall deal with each case separately. The appellant, in my judgment, ought to be held to her contract to leave the conduct of the litigation in the hands of the applicant: he who pays the piper should be entitled to call the tune. Any other course would be unconscionable by reason of her own conduct. On the faith of her promise in writing the applicant had expended what must have been a very considerable sum of money. Is he to be left without any remedy by reason of her going over, as it were, to the enemy? To such conduct, I would respectfully apply the new estoppel thus stated by Denning L.J. (as he then was) in *Lyle Meller v. Lewis*:—<sup>(9)</sup>

"It may not be such as to give rise to an estoppel at common law, strictly so called, for that was confined to representations of existing fact: but we have got far beyond the old common law estoppel now. We have reached a new estoppel which affects legal relations.

This new estoppel applies to representations as to the future. Take the kind of assurance which was held binding in *Central London Property Trust v. High Trees House Ltd.*<sup>(10)</sup> and in *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.*<sup>(11)</sup> in the Court of Appeal (first action), and in the House of Lords (second action). In each of those cases a creditor during the war gave a promise or assurance to the other party that he would for the time being forgo sums which were thereafter to become due to him. In the *High Trees* case it was rent. In the *Tungsten* case it was sums payable by way of compensation. The assurance was not a contract binding in law, but it was an assurance as to the future, it was intended to be acted upon, it was acted upon, and it was held binding on the party who gave it. . . . This new estoppel also applies to representations about legal relations. Take the kind of assertion or assurance which was held binding in *Robertson v. Minister of Pensions*,<sup>(12)</sup> and in the decision of the Privy Council in *Harnham Singh v. Jamal Pirbhai*<sup>(13)</sup> to which Lord Hailsham drew our attention this morning. In each of those cases one party had made to the other a clear and explicit assertion of the legal relationship existing between them. In the *Robertson* case it was a statement by the Crown to an Army officer: 'Your disability has been accepted as attributable to military service.' In the *Harnham* case it was an unequivocal statement by a tenant that he 'will remain in occupation as a statutory tenant'. The statement was not in either case a contract, and not regarded as such, but it was an assurance as to the legal position — as to the legal consequences of the facts known to both — which was intended to be acted upon, it was acted upon, and it was held to be binding."

In my judgment the appellant should not be permitted to leave the applicant in the lurch. As to the company, unless the appellant's objections are sustained I see no point, at this stage, to inquire into the merits of the case or of the appeal itself, as suggested in the affidavit of Lee Wan Seng affirmed on March 29, 1967. The sole and manifest object of the respondent company in paying \$10,000 to the appellant was

A to take no risk of the judgment of Ali J. being reversed on appeal. Once I have come to the conclusion that, in fairness and justice, the applicant ought to be given leave to intervene, I do not think the respondent company's objections raise any further obstacle to the making of the order applied for.

B I would accordingly allow the application, give leave to substitute the applicant's name for that of the appellant, add the second respondents as the second appellants (to which they have consented) and in their place substitute the appellant to be jointly respondent with the company; the costs of this application, in the exercise of my discretion, I order to be costs in the appeal.

*Application allowed.*

Solicitors: Braddell & Ramani; Shearn, Delamore & Co.; Arulanandom & Co.; Dharma-nanda & Co.

## GURBACHAN SINGH v. PUBLIC PROSECUTOR

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and Ong Hock Thye F.J.) August 7, 1967]

E [Penang — Federal Court Criminal Appeal No. X. 2 of 1966]

*Criminal Procedure — Refusal by High Court under s. 66 Courts of Judicature Act 1964, to reserve question of law for decision of Federal Court — Finality of such decision — No right of appeal against refusal provided in the Constitution.*

F After having been convicted by the Sessions Court Alor Star and sentenced, the present applicant appealed to the High Court. His appeal was dismissed. The applicant then applied to the High Court under section 66 of the Courts of Judicature Act that a question of law of public interest concerning his appeal be reserved for decision of the Federal Court. The application was refused. Against that refusal the applicant appealed to the Federal Court. The preliminary question the Federal Court had to consider was whether an appeal lies against that refusal or whether any appeal lies at all.

G Held: the decision of the High Court in exercise of its discretion under section 66 of the Courts of Judicature Act must be regarded as final and the Federal Court has no jurisdiction to review it.

## H FEDERAL COURT.

V. K. Palasuntharam (Jag-Jit Singh and Rasiah Rajasingam with him) for the appellant.

Syed Othman bin Ali (Parliamentary Draftsman) for the respondent.

I The judgment of the Federal Court was delivered by:

Azmi C.J. (Malaya): The applicant was convicted by the Sessions Court at Alor Star of an offence under the Prevention of Corruption Act and was sentenced to a term of imprisonment and a fine. He appealed to the High Court at Alor Star against this judgment.